JD–29–13
Lima, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

C & G DISTRIBUTING, CO., INC.

and

Case 8-CA-091304

TRUCK DRIVERS, WAREHOUSEMEN
AND HELPERS, LOCAL NO. 908
A/W INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Rudra Choudhury, Esq., for the Acting General Counsel.
Ronald L. Mason, Esq., and Aaron T. Tulencik, Esq., of Dublin, Ohio.
for the Respondent.
Julie Ford, Esq., of Dayton, Ohio, for the Charging Party.
William Messenger, Esq., of Springfield, Virginia,
for the Intervener.

DECISION

Statement of the Case

Eric M. Fine, Administrative Law Judge. This case was tried in Findlay, Ohio on February 20, 2013. The charge was filed by Truck Drivers, Warehousemen and Helpers, Local 908 a/w the International Brotherhood of Teamsters (the Union) on October 15, 2012 against C & G Distributing Co. Inc. (Respondent), and the amended charge was filed by the Union on December 21, 2012 against Respondent.[1] The complaint, issued on December 28, alleges Respondent violated Section 8(a)(1) of the Act: by on August 10, providing more than ministerial assistance to employees with the filing and processing of a decertification petition by paying the wages of and providing the use of a company vehicle to its employee and the petitioner Jerry Sprague in order for him to attend the representation proceeding for a decertification petition Sprague had filed; and by, in or around August and September, its agent William P. Wheeler, soliciting employees to pursue the rescission of a union security clause by providing advice and assistance to Sprague with regard to the filing of a de-authorization petition.[2]

[1] All dates are in 2012 unless otherwise indicated.

[2] At the opening of the hearing, an unopposed motion was granted for Sprague to appear as an Intervener in this unfair labor practice proceeding. Sprague was represented by counsel at the unfair labor practice trial, who had previously filed the motion on Sprague's behalf.

On the entire record, including my observation of the witnesses' demeanor, and after considering the briefs filed by the Acting General Counsel, the Intervener, and Respondent,[3] I make the following:[4]

Findings of Fact

I. Jurisdiction

Respondent, an Ohio corporation, has an office and place of business in Lima, Ohio where it is engaged in the sale and distribution of beer and other beverages. Annually, in conducting these business operations, Respondent purchases and receives at its Lima, Ohio facility goods valued in excess of $50,000 directly from points outside Ohio. Respondent admits and I find it is an employer engaged in commerce under Section 2(2), (6), and (7) of the Act and the Union is a labor organization under Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Respondent delivers beer for Anheuser Busch covering a four county area surrounding Lima, Ohio where Respondent's warehouse is located. The owners of the company are Mark Guagenti, Fino Cecala, and Gary Guagenti; and J.R. Guagenti is the vice president of human resources.[5] The collective-bargaining unit involved here consists of truck drivers and warehousemen, of which the parties estimated there were in the mid-20's in terms of the number of employees. Bryan Holliday is the first shift warehouse manager. The second shift warehouse manager is Anthony Azzarello. The bargaining unit employees report to the warehouse manager. There is also a mechanic and part time mechanic working at the facility, as well as sales personnel, merchandisers, and office employees, none of whom are members of the bargaining unit.[6]

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[3] During the course of the trial, counsel for the Acting General Counsel sought to amend the complaint to include an allegation that on December 17, Respondent provided Sprague with the use of a company vehicle to drive to Cleveland to attend an investigatory interview pursuant to a subpoena issued by the Acting General Counsel. Counsel for the Acting General Counsel stated he learned of this allegation the day before the trial began. However, he did not alert counsel for Respondent or counsel for Sprague of the proposed amendment until Sprague was being questioned on the witness stand. Respondent raised due process arguments concerning the amendment and requested an adjournment were the amendment to be allowed. Noting that counsel for the Acting General Counsel stated he felt he had enough evidence to prove the outstanding allegations in the existing complaint without the amendment sought, as well as the due process concerns raised by Respondent, I denied the amendment.

[4] In making the findings, I have considered the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation,* 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951). All testimony and evidence has been considered. If certain testimony or evidence is not mentioned it is because it is cumulative of the credited evidence, not credited, or not essential to the findings herein. Further discussion of the witnesses' credibility is set forth below.

[5] Respondent admitted in its answer to the complaint that J.R. Guagenti, Mark Guagenti, Fino Cecala, and Gary Guagenti are statutory supervisors and agents of Respondent; and that Labor Relations Consultant William Wheeler is an agent of Respondent.

[6] There was testimony by Holliday that mechanic Matt Triplehorne was a member of

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William Wheeler testified he is employed by Midwest Management Consultants, Incorporated (Midwest.) Wheeler testified Respondent's Attorney Ron Mason is the owner of Midwest. Wheeler testified Midwest shares office space with Mason's law firm. Wheeler testified he was hired by J.R. Guagenti as a labor relations consultant for Respondent in April 2012. Wheeler testified he was hired, "To represent management and the employees of that Company with respect to a decertification petition that had been filed." Wheeler is not an attorney. He testified he represents management and employees in matters involving labor relations; and he has previously represented unions a long time ago.

Jerry Sprague had worked for Respondent for about 4 years at the time of the unfair labor practice trial. At the time of trial, Sprague was a warehousemen; and he testified he had been a warehouseman for the last 4 to 6 months. Prior to that time, Sprague was a shift leader on second shift for a little over a year. As shift leader Sprague checked off the orders, checked off the trucks, trained new employees, and picked up employees with car trouble and brought them to work in company vehicles. Sprague testified he thought he was still a shift leader when he filed the October 4 de-authorization petition involved in this proceeding.

Sprague filed a decertification petition in case 8-RD-74472 on February 14 and he subsequently withdrew it.[7] The record does not reveal why Sprague withdrew the February 14 petition. However, the Regional Director's "Decision and Direction of Election" in Case 8-RD-77965 issued on November 8 reveals the most recent collective-bargaining agreement for this bargaining unit was effective through February 14, leading to a possible conclusion the contract was still in effect on February 14 when the February 14 petition was filed and therefore an argument could have been made that the petition was barred by that contract. The Regional Director's decision in Case 8-RD-77964 shows that, following a period of negotiations for a new contract, on February 14 the Union submitted what it believed to be a tentative agreement for a new collective-bargaining agreement with Respondent to its membership for ratification and the agreement was ratified on that date. However, on March 1 the Employer's labor consultant sent the Union an email containing new language concerning an article relating to personal days. The Union sent a reply on March 14, stating they wanted to leave that article as it was.

Sprague testified J.R. Guagenti provided Sprague with Wheeler's phone number some time prior to April 25, but after Sprague filed the February 14 decertification petition. Sprague identified an affidavit he gave to Board Attorney Choudhury on December 17. Upon review of the affidavit, Sprague testified he began talking to Wheeler after Sprague filed the February 14 decertification petition. Sprague testified that between February and December 17, he spoke to Wheeler around 10 times on the telephone. Sprague testified he spoke to Wheeler in February, and Wheeler told him that he was a former agent of the NLRB and he gets involved as a consultant in cases like these.[8] Sprague testified Wheeler may have called Sprague once or

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management and Holliday thought the part time mechanic was also a member of management. However, there was little on the record to substantiate this testimony. I make no findings as to Triplehorne's status as to whether he was a managerial employee.

[7] Sprague was called as an adverse witness by counsel for the Acting General Counsel, and at times was a difficult witness. He was argumentative, and often professed poor recall requiring his memory to be refreshed by pre-hearing affidavits. Sprague also stated he was hard of hearing and had to lip read. However, he had no trouble understanding and answering questions asked at the trial to the extent he claimed his memory would permit.

[8] Respondent's counsel subsequently suggested to Sprague in the form of leading questions to which Sprague tacitly agreed that it was Mason and not Wheeler who informed

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twice in late February because Sprague had called him and left a voice mail. Concerning whether he spoke to Wheeler during work time, Sprague testified he would always tell Wheeler to call him after 5:30 pm. Sprague testified his affidavit stated "The next time I spoke with Bill Wheeler was shortly after I withdrew the first petition, which I believe was in late February 2012."[9] "Do not recall whether I called Bill, or Bill called me. The phone call took place at work." Sprague testified the phone call did take place at work but he did not think he was on the clock. He testified he was on the second shift at that time. He testified Wheeler had called Sprague during work time but Sprague told Wheeler the time Sprague's shift ended and for Wheeler to call him then.[10] On April 3, Sprague filed a decertification petition in Case No. 8-RD-77965. Sprague testified that shortly before he filed the April 3 petition, he had another phone call with Wheeler, during which Sprague told Wheeler that he was going to file the petition.[11]

Sprague testified that Wheeler spoke at two meetings conducted by Respondent to all union represented employees during which Wheeler told them their rights were concerning decertification. Sprague testified that at the second meeting Wheeler spoke about the subsequent de-authorization petition Sprague had filed. Sprague testified that Wheeler called Sprague prior to the first meeting to give him notice of the meeting. Current employee Chad Pierce testified the initial meeting he attended at which Wheeler spoke at Respondent's facility took place on April 16. Pierce recalled the date because Pierce closed on his home the day of

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Sprague that he was a former Board agent. However, Sprague initially and repeatedly testified Wheeler informed him that Wheeler was a former Board agent, an assertion Wheeler did not deny. I have therefore credited Sprague's initial testimony that Wheeler informed him of such.

[9] While Wheeler testified he was not employed with Respondent as a labor consultant until April, he did not deny having phone contact with Sprague in February. Moreover, Wheeler's association with Mason may have led Wheeler to have contact with Sprague prior to Wheeler having a formal contract agreement with Respondent. Noting the specificity of Sprague's testimony pre and during the hearing concerning his February contacts with Wheeler, and Wheeler's failure to deny they took place, I have credited Sprague's uncontradicted testimony as to the February calls.

[10] As set forth above, Sprague testified Wheeler called him during work time. However, Respondent has a policy in its handbook that, "The use of personal cellular phones during work time is prohibited." The handbook also stated that employees will not be called to the company phone except in the case of an emergency, nor would the company make it a practice to take messages.

[11] The Regional Director's "Decision and Direction of Election" in Case 8-RD-77965 reveals that the only issue in that case was whether the parties had reached a new collective-bargaining agreement on February 14, which would have barred the filing of Sprague's April 3 decertification petition. The Union, although it was to eventually lose its argument before the Regional Director, asserted the contract it ratified on February 14 barred the April 3 petition. The chronology set forth in the Regional Director's decision included: the Union's February 14 contract ratification vote; the Respondent's March 1 proposal to amend prior language on personal days; and the Union's rejection of that proposal on March 14. The chronology leads to an inference that Sprague's multiple phone calls with Wheeler prior to Sprague's filing the April 3, were more than benign but rather dealt with Respondent's strategy as to the viability of filing the April 3 petition in view of what was transpiring during its negotiations with the Union. In this regard, Sprague only filed the April 3 petition after repeated consults with Wheeler who was introduced to Sprague by Respondent and used by Respondent as a labor relations consultant. The timing of the April 3 filing close in time to the Union's rejection of Respondent's March 1 proposal suggests Respondent was interjecting its negotiating strategy with the Union into the timing of Sprague's filing of his second decertification petition.

the meeting. Pierce testified all the bargaining unit employees attended along with J.R. Guagenti, Fino Cecala, and Gary Guagenti. Pierce testified Wheeler spoke at a second meeting in October. He testified all the bargaining unit employees were there and it was a mandatory meeting. Pierce testified the same three managers attended.[12]

The parties stipulated that: On August 10, Sprague attended a representation hearing in Case No. 8-RD-77965 at the NLRB Regional Office in Cleveland, Ohio. Sprague did not report to work on August 10. Sprague was the only bargaining unit employee in attendance at the hearing. Sprague was paid regular wages for August 10 for attending the hearing. Sprague was present at the August 10 hearing in his capacity as the decertification petitioner. Sprague did not testify on behalf of Respondent at the August 10 hearing. Respondent provided Sprague with the use of a company vehicle to travel to and from Lima, Ohio to Cleveland, Ohio for Sprague to attend the August 10 hearing at no charge to Sprague other than fuel costs. The round trip driving distance between Lima, Ohio and Cleveland, Ohio is approximately 312 to 352 miles. Respondent did not provide bargaining unit employees other than Sprague use of a company vehicle to travel to and from Lima to Cleveland to attend the August 10 hearing.[13]

Sprague testified that on August 10, he drove a Ford Ranger to and from Lima to Cleveland to attend the representation hearing.[14] He testified Respondent let him borrow the vehicle because his was broken and otherwise he would not have made the hearing. Sprague asked Holliday if he could use the vehicle. Sprague testified he also told J.R. Guagenti that he needed the company vehicle to attend the August 10 hearing and for daily use around that time period. He testified he did use it for a few other days that week as the clutch went out on his personal vehicle a week or two prior to August 10. He told J.R. Guagenti the reason he needed the company vehicle was because his personal car broke down.[15]

J.R. Guagenti testified that on August 9, Sprague received 2 hours and 15 minutes pay for "additional" time because Sprague had to leave early to attend the representation proceeding on August 10. J.R. Guagenti testified that on August 10 Sprague was paid 8 hours "additional" pay because he was paid for the time he went to the representation hearing. He testified Sprague was paid a total of 10 hours and 15 minutes to travel to and from the Cleveland representation proceeding. J. R. Guagenti testified he determined Sprague should be paid the additional time for attending the hearing; after consulting with Respondent's

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[12] Current employee William Klinker confirmed Pierce's testimony that Wheeler spoke at two meetings with all the bargaining unit employees, that the first was in April and the second in October. Klinker confirmed Pierce's testimony as to the attendance of Respondent's owners and J.R. Guagenti at the meetings. Klinker testified the April meeting lasted about 90 minutes and Wheeler explained things about the decertification petition. Sprague estimated the initial company meeting Wheeler attended took place in July. However, Sprague's recollection was hazy as to the date, and I have credited Pierce that the meeting took place on April 16.

[13] The Regional Director's "Decision and Direction of Election" for the August 10 hearing issued on November 8. The decision stated the sole issue in the proceeding was whether a contract existed prior to April 3, the date of the filing of the decertification petition, which would serve as a bar to the election the petition sought.

[14] Bargaining unit employee Chad Crumrine testified he had a conversation with Sprague at work around December 28. Crumrine testified Sprague told him he took a company Ford Ranger to Cleveland for the decertification petition hearing.

[15] Sprague testified he has not purchased a new car since the August 10 hearing and he has been borrowing his brother's car or his mother's car. Sprague testified he disposed of his car since it was not worth fixing.

attorney. Sprague's time report for the period August 5 to 11 shows he was working the evening shift that week. It shows for August 9, he worked 5 hours and 45 minutes recorded as flex time on the schedule and he was credited for an additional 2 hours and 15 minutes labeled "additional" time on the report. On August 10, Sprague was credited with 8 "additional" hours. Sprague was given 8 hours of vacation time for August 8. The time report reveals he was credited with 29 hours and 45 minutes regular time worked that week; 10 hours and 15 minutes additional time; 8 hours vacation time; and 46 minutes overtime for a total of 48 hours and 46 minutes. Thus, in calculating overtime after 40 hours, Sprague was given credit for the additional time, that is the time he was given off on August 9 and 10 totaling 10 hours and 15 minutes which he used to attend the representation hearing on August 10, but not for the vacation time he took on August 8. In sum, Sprague was given 10 hours and 15 minutes of paid leave spanning 2 days to attend the representation hearing, and that paid leave, contrary to his earned vacation time, was used allow him to obtain overtime pay for 46 minutes.

Sprague testified that, a couple of days after the August 10 hearing, he had a conversation with Wheeler.[16] Sprague testified he probably called Wheeler, but he was not sure who placed the call. Sprague testified he told Wheeler that he did not think the August 10 hearing went well, that he thought he was being railroaded by the NLRB, and he thought the NLRB was with the Union. He testified he wanted to know if there were any other legal things he could do to get out of the Union. Sprague testified Wheeler told him about the filing of a de-authorization petition. Sprague testified Wheeler said if Sprague could get enough people to support the de-authorization petition it would give them a chance not to have to pay union dues. Sprague testified he had a follow-up conversation with Wheeler in September. Sprague called Wheeler. Sprague testified the conversation was about if the decertification did not go through, was the de-authorization petition a smart move, and would it get thrown out just as fast as the decertification petition did. Sprague testified he asked Wheeler questions. Sprague testified he did not know what a de-authorization petition was prior to his conversation with Wheeler. He testified Wheeler explained to him that he needed 50% of the union vote to do a de-authorization petition as opposed to the decertification petition were you only had to have 50% of those who showed up to vote.[17]

The parties stipulated that in early September, Sprague called Wheeler, and asked Wheeler if there was anything else he could do if the NLRB did not let Sprague proceed to a decertification election. Wheeler told Sprague that he could file a de-authorization petition. Wheeler explained to Sprague the procedures to file a de-authorization petition. On September 20, Sprague filed Case 8-RD-89588 which was withdrawn after Sprague learned he used the wrong petition form to file a de-authorization petition. On October 4, Sprague filed a de-

[16] Sprague later testified the call was within the next week of the hearing, that he did not recall if it was one or two days, but it was after the August 10 hearing.

[17] Wheeler testified that in June, July, and August he did not have any conversations with Sprague regarding the de-authorization petition or anything else. Wheeler gave no specifics as to why he was sure he did not speak to Sprague in August about the de-authorization petition. On the other hand, Sprague was specific that within a few days, or the following week after the Friday, August 10 hearing he contacted Wheeler concerning Sprague's frustration with the hearing at which point Wheeler first informed him of the option of filing a de-authorization petition. Moreover, despite disputing the timing, Wheeler did not deny that he had two conversations with Sprague about the de-authorization petition before Sprague filed it. While in general Sprague's recall as to dates was hazy, he testified with specificity as to the timing of the August conversation, and I have credited his testimony as to the two conversations with Wheeler, as set forth above.

authorization petition in Case 8-UD-90639.

Sprague testified that, around a week after he spoke to Wheeler about de-authorization, he started working on the petition. Sprague testified it took him around a day to gather signatures for the de-authorization petition. Sprague testified that within a few weeks of the conversation with Wheeler, Sprague filed the de-authorization petition. Sprague testified the NLRB prepared the petition for him, and Board agents prepared all four petitions for him. He testified no one from management ever helped him gather signatures for the petitions, and he collected all the signatures himself.

A. Use of Company Vehicles by Bargaining unit employees

The parties stipulated that Respondent has maintained a policy and/or practice permitting bargaining unit employees to use company vehicles for non-work related purposes that are of a personal nature. Such non-work related purposes are by way of example, hauling and moving employees' personal property such as furniture, driveway snow removal, the hauling of firewood and moving dirt.

Sprague testified that 90 percent of the people there have borrowed a company vehicle for some sort of personal matters. However, he was only able to give a few examples. Sprague was clearly an advocate for the dismissal of the complaint, and, considering his demeanor, I have only credited his testimony concerning bargaining unit employees usage of company vehicles to the specific examples he was able to provide as set forth below.

Sprague testified Respondent has a box truck, which Sprague used to move his belongings from one house to another. He testified he had the truck overnight and the move was about five miles. Sprague obtained permission to use the truck from Holliday. Sprague also testified that then warehouse employee Cira used a company vehicle when he was moving between houses both located in Wapakoneta, and that the houses were about a mile and one half apart. He testified Wapakoneta is about 20 miles from Respondent's facility in Lima. Sprague helped Cira on that trip. The estimated usage based on Sprague's testimony was 42 miles. Sprague testified that on another occasion, after Cira left Respondent's employ, Sprague borrowed a company vehicle to help Cira move. This time the move was from Wapakoneta to Van Wert. Sprague obtained permission from Holliday to use the truck. He estimated this move took place a year prior to his testimony. Sprague testified the distance from Respondent to Wapakoneta and then to Van Wert is about 60 miles one way and 120 miles round trip.

Chad Pierce has worked for Respondent for a little over eight years as a bargaining unit employee. Pierce testified he has been a union steward for close to four years. Pierce was not aware that Respondent has any formalized policies for bargaining unit employees borrowing company vehicles.[18] Pierce testified last summer he borrowed a company pickup truck. Pierce

[18] Pierce identified Respondent's "Employee Handbook" which contains a section entitled "COMPANY VEHICLE". Pierce testified he understood the referenced policy was not applicable to bargaining unit employees. Rather, he testified Respondent provides company vehicles which are assigned to sales personnel and merchandisers for business and personal use. He testified he understood the arrangement for these vehicles is that they are provided as part of the salary for those individuals. Pierce' testimony on this point is not contradicted on the record. Accordingly, as his testimony is consistent with the language in the handbook provision, I have concluded the provision is not applicable to bargaining unit personnel. There was also some isolated testimony concerning non bargaining unit personnel using company vehicles. No party

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asked permission from Holliday to use the truck. He told Holliday that he needed to go to town to pick up a dresser and Pierce's pickup truck was not working. Holliday said it would be okay but to make it quick. Pierce estimated he used the company vehicle for about an hour, and he drove around 10 miles. Pierce testified employee Graham used a company vehicle for non work purposes. In the summer of 2012, Pierce passed Graham on a Saturday while Graham was driving a company pickup truck. Graham was hauling some mulch to his house. Pierce testified Graham lived around 5 miles from Respondent's facility.

Chad Crumrine is a current bargaining unit employee and he has worked for Respondent a little over five years. Crumrine testified that before Christmas in 2012 employee Hume used a company vehicle for personal use to transport a gun safe and Crumrine helped unload the safe at the employee's house. Hume took the truck to Tractor Supply which is about a 10 minute drive and less than 10 miles from Respondent's facility.

William Klinker has worked for Respondent for 35 years, the last 28 of which he has been a route driver. He testified that during the last five years he has not borrowed a company vehicle or equipment. Klinker testified that while he was a bargaining unit employee current night manager Azzarello borrowed a company vehicle last summer to move furniture. J. R. Guagenti testified Azzarello became the night manager, a non unit position, in 2013.

Keith Paul has been employed by Respondent as a driver for close to 19 years. He testified he has borrowed quite a few company vehicles during that time. Paul testified he used the vehicles to work with the local school district by hauling Pepsi products from the school stadium to the high school. Paul testified on several occasions he has had to borrow a vehicle to move a freezer from the stadium to the high school for concessions for football or basketball games. Paul testified the last time he did it was this season for football estimating it was 2 to 3 months prior to the hearing. Paul testified he does this every year typically twice a year. He estimated that over the last 19 years he has borrowed the truck close to 40 times. Paul initially testified he uses the company vehicle a maximum of 25 to 35 miles at most each time. Paul testified he would characterize this as all local drives.[19] Paul testified the warehouse manager gave him permission to use the truck. The warehouse manager currently is Holliday and prior to Holliday it was Tom Rainsburg. Paul testified he has never used a company vehicle for anything other than local drives.[20]

Holliday testified he has been a warehouse manager for Respondent since 2004. Holliday testified that, as warehouse manager, his duties include allowing employees to borrow company vehicles. He testified other managers including Matt Triplehorne and J.R. Guagenti,

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has argued the use of company vehicles by non bargaining unit personnel is relevant to this proceeding and I have not relied on it. In fact, at one point, counsel for Respondent argued on the record that it was not relevant.

[19] Using the 40 times estimate over 19 years with a 30 mile trip would be 1200 miles for which Paul estimated he has used a company vehicle. Paul was a union steward or alternate steward for a total of about 10 years until 2008.

[20] Paul testified that, around a year ago, Klinker had mechanical problems with his personal vehicle and Klinker borrowed a company pickup truck. Paul testified Klinker's vehicle was in the shop. However, Klinker credibly denied borrowing one of Respondent's vehicles. Rather, Klinker testified he borrowed company mechanic Triplehorne's personal vehicle, not a company vehicle, while Triplehorne was working on Klinker's truck. I have credited Klinker that he did not use a company vehicle, noting in particular that Paul testified he did not know who Klinker asked to borrow the truck.

can authorize employees to use them. Holliday testified in the past two years at least 15 to 20 bargaining unit employees have borrowed a company vehicle for personal use. Holliday testified there are no mileage restrictions on the loan of the vehicle, and employees have used a company vehicle for up to a week when their vehicle is in disrepair. Holliday testified that, when an employee borrows a vehicle for a week, Holliday is not aware of the number of miles the employee puts on it. He testified they could go where ever they want and with no limit on miles. He testified Respondent does not record the mileage used.

I did not find Holliday's testimony very persuasive as to his claims concerning the use of company vehicles. Despite his claim that 15 to 20 employees have borrowed vehicles in the past two years, he could come up with very few examples. Moreover, as to his claims that Respondent does not monitor the mileage for which the borrowed vehicle is used, the evidence disclosed that employees inform the relevant official the reason the vehicle is being borrowed, and provide them with sufficient information to determine it is going to be used for local driving. In this regard, from the examples Holliday provided where he approved the use of the truck, he knew the purpose of the request, and he testified all the requests were for local driving. Holliday testified he considers a local drive to be in or around Lima. Holliday testified he would not consider a drive from Lima to Cleveland to be a local drive. I have only credited Holliday as to the number and nature of the requests for borrowing a company truck for which he could provide direct testimony of the occurrence as set forth below. I find the remainder of his testimony to be vague and purposefully exaggerated to support Respondent's position.

Holliday testified employee Conley, who is no longer with Respondent, borrowed a vehicle within the last two years. Conley borrowed a pickup truck. Holliday testified Triplehorne gave Conley permission to borrow it. Holliday testified Conley borrowed the truck because his truck broke down and he used it for around a week. Holliday testified that as far as he knew Conley just drove the truck to and from his house to work. Holliday testified Conley lived around 10 miles from work. Holliday testified Conley was the only employee he could recall that used a company vehicle for an extended situation in the last two years. When asked to name other employees who borrowed a company vehicle, Holliday could only come up with two examples. Holliday testified Graham used a company vehicle to hall firewood. Holliday did not recall when Graham made the request to borrow the pickup but he asked Holliday for permission. Holliday testified Graham said he was going to pick up firewood and take it home. Holliday testified that Graham lived around 3 or 4 miles from Respondent. Holliday testified Hume use the box truck to pick up a gun safe. Hume asked Holliday to use the truck. Hume told Holliday where he was going to get the safe and Holliday recalled it was a local drive.

B. Analysis

In *Mickey's Linen & Towel Supply,* 349 NLRB 790, 791 (2007), the Board, in finding the respondent provided unlawful assistance to an employee's decertification effort, stated:

> It is well settled that an employer violates Section 8(a)(1) of the Act by "actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative." *Wire Products Mfg. Co.*, 326 NLRB 625, 640 (1998), enfd. sub nom. mem. *NLRB v R.T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7th Cir. 2000). In determining whether an employer's assistance is unlawful, the appropriate inquiry is "whether the Respondent's conduct constitutes more than ministerial aid." *Times Herald*, 253 NLRB 524 (1980).

In *Mickey's Linen,* the Board found that, although the circulating employee alone initiated the decertification effort, the respondent's conduct constituted more than ministerial aid when an

individual translated for the employee who was soliciting signatures, moments after the individual served as a translator for the respondent at a mandatory employee meeting that concerned union matters, in particular, the ongoing collective-bargaining negotiations.

In *Process Supply*, 300 NLRB 756 (1990), the Board found an employer violated Section 8(a)(1) of the Act by sponsoring and assisting in the circulation of a decertification petition. There, the employer posted on a bulletin board a letter from its attorney indicating the manner in which a decertification petition should be prepared. The day after this letter was posted; an employee circulated a petition to oust the union during work time with the knowledge of management officials. Similarly, in *Armored Transport, Inc*., 339 NLRB 374 (2003), the Board found an employer unlawfully solicited a decertification petition in violation of Section 8(a)(1) of the Act. The Board stated at 377:

> The law is clear that an employer may not solicit its employees to circulate or sign decertification petitions and may not threaten employees in order to secure their support for such petitions. An employer may not provide more than ministerial aid in the preparation or filing of the petition. The decision regarding decertification responsibility to prepare and file a decertification petition belongs solely to the employees. 'Other than to provide general information about the process on the employees' unsolicited inquiry, an employer has no legitimate role in the activity, either to instigate or to facilitate it.' *Harding Glass Co.*, 316 NLRB 985, 991 (1995), and cases cited therein.

Thus, the Board has held an employer's lawful involvement with a decertification petition is limited to providing accurate information in response to employee questions without threats or promises. *Amer-Cal Indus.*, 274 NLRB 1046, 1051 (1985) and cases cited therein.

In *Lee Lumber and Bldg. Material Corp.* 306 NLRB 408, 410, enfd. in rel. part, 117 F.3d 1454 (D.C. Cir. 1997), the Board stated:

> Although we have found no unlawful encouragement of the employees' decertification activities, we agree with the judge, for the reasons stated in his opinion, that the Respondent violated Section 8(a)(1) by providing assistance, in the form of time off with pay, reimbursed parking expenses, and transportation, [FN13] to the employees who filed the petition with the Board.

In *Lee Lumber,* the respondent provided a few hours time off with pay to three employees for their filing or participating in the filing of a decertification petition with the Board. The judge concluded that by these actions the respondent openly endorsed the employees venture. The judge went on to state, "The Board has held that an employer renders unlawful assistance in conjunction with decertification activity where employees are paid for time spent in filing the election petition and where transportation is provided. *Dayton Blueprint Co.*, 193 NLRB 1100, 1107-1108 (1971)." id. at 418.[21]

[21] In the present case, the Intervener, in its brief, cites cases such as *Tecumseh Corrugated Box Co.,* 333 NLRB 1, 6 (2001), for the proposition that in a Section 8(a)(2) context the Board has held it lawful for an employer to permit non-employee union organizers to use company paid time and property to collect signatures on authorization cards. In *Tecumseh,* following a mandatory meeting concerning the respondent's operations, a union was permitted to address employees on work time and on company property, but the employees were not required to remain during the union's presentation, and the supervisors left the room while employees signed authorization cards. The Board in affirming the judge found that this conduct, standing

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In *Texaco, Inc. v. NLRB,* 722 F.2d 1226, 1233 -1235 (5th Cir. 1984) it was stated:

> This Court has held that "[s]ection 8(a)(1) of the Act makes it unlawful for an employer to instigate and promote a decertification proceeding or induce employees to sign any other form of union repudiating document, particularly where the solicitation is strengthened by the express or implied threats of reprisal or promises of benefit." *NLRB v. Proler International Corporation,* 635 F.2d 351, 354 (5th Cir.1981); *NLRB v. Birmingham Publishing Company,* 262 F.2d 2, 7 (5th Cir.1958). In *Proler,* two company representatives invited several employees to restaurants away from the plant site. There, the company representatives expressed strong anti-union sentiments and urged the employees to sign a petition asking for another union election. Although these actions involved no express coercion, this Court found them to be in violation of § 8(a)(1). The evidence in *Proler* showed that the company paid for the employees' lunches and paid the employees for the time they spent attending the lunches. In addition, the company provided at least one automobile to transport employees to the restaurants where the luncheons were held, and after one luncheon, one of the company representatives gathered several of the employees in the personnel office of the company to obtain their signatures for a revote petition. Our decision in *Proler* clearly indicates that it is not necessary for an employer to threaten, coerce, or promise benefits to employees in order for its conduct to violate § 8(a)(1). "Interference" in the terms of the statute is enough.
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> In *NLRB v. Birmingham, supra,* 262 F.2d at 6-8, an employee requested from company supervisors information on how to transfer to another union. The supervisors first asserted the company's neutrality, then proceeded to help the employee draft a decertification petition. The Board found that the employee "used company time and facilities, and obtained at least indirect support from company officials" in drafting and circulating the petition. *Id.* at 6. We held that the evidence sustained the Board's finding that Birmingham had promoted a movement to decertify the Union in violation of § 8(a)(1). Although unlike in the instant case, the Birmingham supervisors also made promises of economic benefit to the employees, our holding is instructive nonetheless. The thrust of this Court's ruling in *Birmingham,* as in *Proler,* is that an employers' actions in fostering decertification, furnishing advice, and assisting in the distribution of a decertification petition goes "beyond mere passive observance," even in the face of asserted neutrality. *Id.* at 8.
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> In sum, a review of this Court's decisions in cases where we are called upon to review Board decisions finding unfair labor practices clearly indicates that we have traditionally held that the type of acts committed by Texaco are proscribed by § 8(a)(1). Thus, we have concluded that an employer violates § 8(a)(1) when it (1) composes and types anti-union documents, *NLRB v. Movie Star, Inc.,* 361 F.2d 346, 348-49 (5th Cir.1966); *NLRB v. Birmingham Publishing Co., supra,* 262 F.2d at 6-8; (2) permits employees to use its facilities or personnel, *NLRB v. Proler International Co., supra,* 635 F.2d at 354-55; *NLRB*

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alone, did not rise to the level of a violation of the Act. I find the circumstances in *Tecumseh* and like cases to be distinguishable from the events here. In the current case, Respondent has an obligation to recognize and bargain in good faith with the employees' collective-bargaining representative. It can hardly be said to be doing that while at the same time it is actively promoting and engaging in acts to finance the Union's decertification. It is clear that is the reason why the Board has prohibited an employer from engaging in beyond mere "ministerial" acts in the decertification process. For reasons set forth in this decision I have found Respondent has crossed the line.

v. Movie Star, Inc., supra, 361 F.2d at 348-49; (3) permits anti-union activities during working time, *NLRB v. Birmingham Publishing Co., supra,* 262 F.2d at 6-8; (4) fails to apply no-solicitation rule to anti-union activity, *Marathon LeTourneau Company, Longview Division v. NLRB, supra,* 699 F.2d at 256; (5) pays employees for anti-union activities, *NLRB v. Proler International Corp., supra,* 635 F.2d at 354; or (6) participates in the circulation of anti-union documents, *NLRB v. Birmingham Publishing Co.,* 262 F.2d at 6-8; *NLRB v. Hill & Hill Truck Line, Inc.,* 266 F.2d 883, 885-86 (5th Cir.1959).

* * *

As the Second Circuit noted in *Monroe Tube,* the propriety of an employer's conduct "must be assessed in light of all the facts in the case." 545 F.2d at 1325. We agree that "the essence of the proscribed conduct [under § 8(a)(1)] is not merely opposition to union activity, but *interference* or coercion which makes impossible the free exercise of employees' rights." *Ibid.* (Emphasis added.) We conclude that the totality of the facts as set out above clearly show that Texaco's conduct went beyond mere expressed "opposition" to union activity and reached the level of interference with the rights of the employees to exercise freely the choices provided in § 7 of the Act.

In the instant case, then shift leader Sprague filed a decertification petition in case 8-RD-74472 on February 14, and he subsequently withdrew it. Sprague testified Vice President of Human Resources J.R. Guagenti provided Sprague with Labor Consultant Wheeler's phone number after Sprague filed the February 14 decertification petition. Wheeler testified he was hired by Respondent, "To represent management and the employees of that company with respect to a decertification petition that had been filed." I have concluded that J.R. Guagenti's provision of Wheeler's phone number to Sprague was unsolicited by Sprague. In this regard, neither Sprague nor J.R. Guagenti testified Sprague asked for assistance or for Wheeler's number. In fact, Sprague's testimony reveals he did not know who Wheeler was prior to J.R. Guagenti providing him with Wheeler's contact information. Rather, I find the provision of the phone number and contact information was an unsolicited act on the part of Respondent in furtherance of Sprague's decertification efforts.

Sprague testified he began talking to Wheeler after Sprague filed the February 14 decertification petition. Sprague testified that between February and December 17, he spoke to Wheeler around 10 times on the telephone. I find that Sprague's recall of the substance of his multiple conversations with Wheeler was purposely vague. Rather, the number and timing of the calls suggests that Wheeler took more than a benign role in the decertification process contrary to the role the tenor of Sprague's testimony attempted to suggest. Sprague testified Wheeler may have called Sprague once or twice in late February because Sprague had called him and left a voice mail. Concerning whether he spoke to Wheeler during work time, Sprague testified his pre-hearing affidavit stated "The next time I spoke with Bill Wheeler was shortly after I withdrew the first petition, which I believe was in late February 2012." "Do not recall whether I called Bill, or Bill called me. The phone call took place at work." Sprague testified he was on the second shift at that time. He testified Wheeler had called Sprague during work time but Sprague told Wheeler the time Sprague's shift ended and for Wheeler to call him then. Sprague's admission that he took calls from Wheeler during work time, even if they were just to schedule another call as Sprague claimed, is an admission that Wheeler called Sprague in violation of Respondent's published cell phone policy which states, "The use of personal cellular phones during work time is prohibited."

Sprague testified that shortly before he filed his second decertification petition he had another phone call with Wheeler. Following that call, on April 3, Sprague filed the current decertification petition in Case No. 8-RD-77965. As set forth above, I do not find the timing of Sprague's and Wheeler's contacts to be coincidental. Rather, the provision of Wheeler's

number to Sprague by J.R. Guagenti appears to be part of a planned strategy to guide Sprague through the decertification process. In this regard, the existing collective-bargaining agreement ran through February 14, the date of Sprague's prior petition. The Union believed the parties had reached a successor agreement on February 14 as it sent the terms of the contract to the employees for ratification. However, on March 1, Respondent sent the Union a new proposal on personal days, which the Union rejected on March 14. Two weeks later, after several phone calls with Wheeler, the last being shortly before April 3, Sprague filed his second decertification petition. These phone contacts suggest Respondent was orchestrating the timing of the petition's filing by Sprague to coincide with its bargaining strategy, with its ultimate purpose to dislodge the Union.

On April 16, Wheeler spoke at Respondent's facility at a mandatory meeting for bargaining unit employees. In addition to the bargaining unit employees, J.R. Guagenti attended along with Respondent's owners Cecala and Gary Guagenti. Sprague testified Wheeler told the employees their rights concerning decertification. The meeting lasted around 90 minutes. Sprague testified Wheeler called him around two or three days before the April 16 meeting to give Sprague a heads-up. Sprague testified Wheeler informed him that they were going to have a meeting at work for all the union employees and they were going to explain their rights as it pertained to the decertification petition. This continued contact between Wheeler and Sprague supports my conclusion that Sprague and Respondent's officials were working hand in hand in the decertification process.

Sprague testified that on August 10, he drove Respondent's Ford Ranger from Lima to Cleveland and back to Lima to attend the decertification hearing in Cleveland on that date.[22] He testified Respondent let him borrow the vehicle because his was broken. Sprague testified the Ford Ranger was provided to him by Holliday, at Sprague's request. Sprague also told J.R. Guagenti that he needed the company vehicle to attend August 10 hearing and for daily use around that time period. He testified he did use it for a few other days that week as the clutch went out on his personal vehicle a week or two prior to his having to go to the hearing.[23] In addition to providing Sprague with transportation to and from the Cleveland hearing, Respondent paid his wages for part of the day on August 9 in the amount of 2 hours and 15 minutes and for a full 8 hours on August 10 for a total of 10 hours and 15 minutes to allow Sprague to attend the hearing on August 10. In addition, Respondent added this time to the regular hours Sprague worked that week so he could earn 46 minutes of overtime pay. By way of contrast, Sprague also took 8 hours vacation pay that week which was not used in Respondent overtime calculation. Thus, Sprague was given a greater compensation in terms of benefits for time spent attending the hearing than he was for his earned vacation time.[24] The parties stipulated that Sprague was present at the August 10 hearing in his capacity as the decertification petitioner. Sprague did not testify on behalf of the Respondent at the August 10 hearing. The driving distance between Lima and Cleveland round trip is approximately 312 to 352 miles.

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[22] Employee Crumrine testified that around December 28, Sprague informed Crumrine that Sprague had the use of one of Respondent's vehicles to attend the hearing in Cleveland.

[23] Sprague testified he has not purchased a new car since August 10, and he has been borrowing his brother's car or his mother's car. Sprague testified he sold his car since it was not worth fixing.

[24] J. R. Guagenti testified he determined Sprague should be paid the time for attending the hearing after consulting with Respondent's legal counsel.

Sprague's testimony reveals that a couple of days to within the next week after the August 10 hearing, he had a phone conversation with Wheeler. Sprague was not sure who placed the call. During the call, Sprague told Wheeler that he did not think the hearing went well. He testified he told Wheeler that he thought he was being railroaded by the NLRB and he thought the NLRB was with the Union. Sprague testified he wanted to know if there were any other legal things he could do to get out of the Union. Sprague testified Wheeler told him about the filing of a de-authorization petition. Sprague testified Wheeler said if Sprague could get enough people to support the de-authorization petition it would give them a chance not to have to pay union dues. Sprague testified he had a follow-up conversation with Wheeler sometime in September. Sprague testified the conversation was about if the decertification did not go through, was this a smart move referring to the de-authorization petition, as to whether it would get thrown out as fast as the decertification petition. Sprague testified he asked Wheeler questions. Sprague testified he did not know what a de-authorization petition was prior to his conversation with Wheeler. He testified Wheeler explained to him that he needed 50% of the union vote for a de-authorization petition as opposed to the decertification petition were you only had to have 50% of those who showed up to vote.

Sprague testified that, a week or so after he spoke to Wheeler about a de-authorization petition, he started working on the petition. Sprague testified it took him around a day to gather signatures for the de-authorization petition. Sprague testified that within a few weeks of the conversation with Wheeler, Sprague filed the de-authorization petition. Sprague testified the NLRB prepared the petition for him, and Board agents prepared all four petitions for him. He testified no one from management helped him to gather signatures for the petitions, and he collected all the signatures himself. On September 20, Sprague filed Case 8-RD-89588 which was withdrawn after Sprague learned he used the wrong petition form to file a de-authorization petition. On October 4, Sprague filed the de-authorization petition in Case 8-UD-90639. In October, Wheeler held another meeting attended by bargaining employees, as well as J.R. Guagenti and Respondent's owners who had attend the April 16 meeting. During the meeting Wheeler spoke about the de-authorization petition. Sprague's concerns about the possible dismissal of his decertification petition following the August 10 hearing, were apparently unfounded because on November 8, the Regional Director issued a "Decision and Direction of Election" concerning Sprague's outstanding decertification petition.

I find a pattern is evident here in that Respondent has unlawfully insinuated itself into and promoted the decertification process by providing Sprague with his own personal experienced labor relations adviser, paying Sprague's wages and providing him transportation to attend the decertification petition hearing, and thereafter suggestion to him the idea of filing a de-authorization petition. Sprague filed his initial decertification petition on February 14, and thereafter withdrew it. Around that time, J.R. Guagenti provided Sprague with Wheeler's contact information. Thereafter, Wheeler served as Sprague's confidant and advisor throughout the decertification process. I have concluded Sprague did not request Wheeler's information from Respondent, and thus Respondent offered to provide Sprague with experienced labor relations advise when none had been requested. Wheeler was employed by Respondent's Attorney Mason. Wheeler, in fact, testified part of his function was to advise employees. In fact, Sprague's testimony reveals that he spoke to Wheeler around the time he withdrew the February 14 petition; and shortly before he filed the April 3 petition. Wheeler gave Sprague a phone call and a heads up before Wheeler conducted his mandatory employee meeting on April 16, which included Respondent's owners, and J.R. Guagenti. I have concluded that at least some of Wheeler's calls to Sprague contravened Respondent's published cell phone policy concerning receiving calls during working time. Sprague also asked for and received the use of Respondent's vehicle on August 10, and at other times during that week. The main purpose for his borrowing the vehicle was to travel to and from Cleveland an over 300 mile round trip. J.R.

Guagenti, who had previously provided Sprague's access to Wheeler, approved the use of the vehicle for the trip to Cleveland. J.R. Guagenti also approved, after consult with counsel, paying Sprague's full wages for August 10, the day Sprague attended the hearing, and a for portion of his wages on August 9 to allow him to leave work early to attend, for a total of 10 hours and 15 minutes pay. Respondent used this time to add to Sprague's regular hours worked to allow him to earn 46 minutes of overtime that week. This benefit is heightened by the fact that Respondent did not use Sprague's 8 hours vacation pay used that week in calculating overtime. By providing him Wheeler as an adviser, providing Sprague transportation to the hearing, and paying his wages to attend, Respondent has created the impression that Sprague was doing Respondent's bidding in spearheading the decertification and de-authorization activities. I find Respondent has violated Section 8(a)(1) of the Act by providing Sprague with transportation to the hearing and paying his wages on August 9 and 10 for hours he did not work, but which were used to attend the decertification hearing. See, *Lee Lumber and Bldg. Material Corp.* 306 NLRB 408, 410, enfd. in rel. part, 117 F.3d 1454 (D.C. Cir. 1997); *Dayton Blueprint Co.*, 193 NLRB 1100, 1107-1108 (1971); and *Texaco, Inc. v. NLRB,* 722 F.2d 1226, 1233 -1235 (5th Cir. 1984).[25]

Following his use of Respondent's vehicle and being paid by Respondent to attend the August 10 hearing, Sprague again spoke to Wheeler. Sprague testified that, during the call, he told Wheeler that he did not think the August 10 hearing went well, and he asked Wheeler if there were any other legal things he could do to get out of the Union. Sprague testified Wheeler then told Sprague about the filing of a de-authorization petition. Wheeler said if Sprague could get enough people to support the de-authorization petition it would give them a chance not to have to pay union dues. Sprague testified he had a follow-up conversation with Wheeler in

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[25] Respondent and the Intervener argue Respondent had a practice of lending vehicles to bargaining unit employees. However, both Sprague and Respondent witness Holliday exaggerated the extent of this practice, and when pressed to cite specific examples each could only come up with a few. Moreover, I place little credence in Holliday's testimony that Respondent did not question the employees about mileage or place a mileage limit regarding the occasional loan of these vehicles. In this regard, the testimony of the unit employees and of Holliday reveals that Respondent was informed the purpose of the loan of the vehicle, and it could be gleaned from the purpose described that the vehicles were being loaned for local driving for area errands. Holliday admitted it was his understanding that prior loans of the vehicles had been for local drives, of which Sprague's trip to Cleveland was not one. I note, in passing, that one employee was able to obtain the use of a vehicle twice a year to assist a local school in moving concessions for its sporting events. While Respondent is to be condoned for the use of its vehicle, it did not inure as much to the employee's benefit as to that of the local school district. Regardless, the nature of Sprague's use of the truck to attend the Board proceeding was different in nature due to the distance and purpose it was borrowed. Moreover, Respondent can point to no other example of when an employee borrowed a company vehicle, took off from work for a personal matter, and was paid over a full day's wages on top of the loan of the vehicle. Rather, I find the loan of the vehicle for a lengthy trip and the payment of his wages while he was on that trip was a combined Act and part and parcel of Respondent's ongoing conduct to promote Sprague's decertification efforts. Sprague's contention that he needed the vehicle because his car broke is not persuasive. Sprague's testimony reveals his car was in disrepair a period of time prior to the hearing at which point he did not request the loan of a vehicle from Respondent. Moreover, Sprague testified he never since fixed his car or bought a replacement. Rather, he borrowed a vehicle from family members. Sprague was given the use of Respondent's vehicle because Respondent supported and encouraged the mission for its usage.

September. Sprague testified the conversation was about whether it was a smart move to file the de-authorization petition in terms of whether it would be dismissed just as easily as the decertification petition. Sprague testified he asked Wheeler questions. Sprague testified he did not know what a de-authorization petition was prior to his conversations with Wheeler. Sprague testified that around a week after he spoke to Wheeler about de-authorization, he started working on the petition. On September 20, Sprague filed Case 8-RD-89588 which was withdrawn after Sprague learned he used the wrong petition form to file a de-authorization petition. On October 4, Sprague filed the current de-authorization petition in Case 8-UD-90639.

I find Wheeler's suggesting to Sprague that he file the de-authorization petition constitutes conduct violative of Section 8(a)(1) of the Act. Wheeler's conduct must be viewed in the totality of the circumstances in which it came. See *Texaco, Inc. v. NLRB,* 722 F.2d 1226, 1235 (5th Cir. 1984).[26] At first blush, it appears that Sprague called Wheeler and solicited his advice to which Wheeler merely responded, bringing about arguments that Wheeler's remarks were neutral speech protected by Section 8(c) of the Act. This is particularly so since Sprague testified that Respondent did not provide him any assistance in preparing the de-authorization petition, or soliciting employee signatures for it. On the other hand, I have concluded that J.R. Guagenti introduced Wheeler to Sprague in an unsolicited effort to support Sprague's efforts to decertify the Union. See, *Pic Way Shoe Mart*, 308 NLRB 84 (1992). Thereafter, Respondent's agent Wheeler, through multiple phone calls, provided Sprague free advice concerning the decertification process. Thus, Sprague was operating arm and arm with Respondent in his efforts to decertify the Union culminating in Respondent providing transportation and paying Sprague to attend the August 10 representation hearing. When, following the hearing, Wheeler continued to advise Sprague and informed him of the idea of a de-authorization petition, I have concluded Wheeler's suggestion was part of a pattern of support and interference, as opposed to a mere response to solicited advice. I find that through Wheeler and its other conduct, Respondent crossed the line and was promoting decertification as opposed to providing mere ministerial aid. See, *Condon Transport,* 211 NLRB 297, 302 (1974).

I do not find cases cited by Respondent require a different result. In *Ernst Home Centers,* 308 NLRB 848 (1992), the Board concluded that in response to an employee's request the respondent employer's provision of decertification language to the employee did not violate Section 8(a)(1) of the Act. The Board found the mere provision of the language "does not answer the question of who, if anyone, suggested or encouraged Jovanavich to file the decertification petition." Here, after introducing Sprague to Wheeler, Respondent provided Sprague transportation to the decertification hearing and paid him for attendance. Shortly, after the hearing, Wheeler, who was on Respondent's payroll, but having assumed the role of Sprague's personal labor adviser, informed Sprague of the idea of filing a de-authorization petition, which Sprague filed shortly thereafter. The idea of the de-authorization petition was clearly initiated by Respondent shortly after it played a key role in financing Sprague's decertification efforts. *Washington Street Foundry,* 268 NLRB 338 (1983), is clearly not controlling here. There, the judge found the respondent, upon request of an employee, provided some "inconsequential" phrases in the drafting of a decertification petition. Thereafter,

[26] Respondent argued at the hearing, and reiterates in its brief, that a stipulation the parties entered into should have foreclosed a hearing in this matter. To their credit, the parties did enter into a stipulation concerning certain matters which was admitted into evidence. However, the stipulation did not contain an agreement that it was to preclude any party from submitting additional evidence, and I have found the evidence submitted helpful as to gaining an understanding as to the totality of the circumstances as to what took place at Respondent's facility concerning Sprague's petitions.

the employees circulated the petition without further manifestation of the employer's approval. Here, Wheeler, who had been hired by Respondent for the decertification process suggested the filing of the de-authorization petition to Sprague. He also conducted two mandatory meetings with bargaining unit employees in the presence of Respondent's owners concerning the decertification and de-authorization process. While in *Washington Street Foundry* an agent for the respondent employer gave the decertification petitioner a ride to the Regional office to file the petition the judge distinguished that instance from cases where a respondent incurred expenses to transport the petitioner to the Board's office noting in *Washington Street Foundry* the respondent's agent was going to the Board's office anyway and the employee merely hitched a ride. Finally, in *Washington Street Foundry,* while the employee was allowed time off to file the petition, he had to make up for the time by working at straight time the following Saturday. In the instant case, Sprague was provided the independent use of Respondent's vehicle to attend the hearing to travel over 300 miles, and he was paid over 10 hours in pay to attend, with those hours being used in the calculation of overtime for him, without his having to make up the time as was required by the employee in *Washington Street Foundry.* In *Eastern States Optical Co.,* 275 NLRB 371 (1985), the attorney of a respondent employer took two phone calls from an employee who had already initiated the decertification process. The attorney provided the employee with editorial aid in the drafting of the petition and during the second call he provided objective information such as the unit description for filling out the Board's petition form. The Board stated that respondent does not violate the Act by rendering such "ministerial aid", but "its actions must occur in a 'situational context free of coercive conduct.'" Here, I have found Respondent violated Section 8(a)(1) of the Act by providing Sprague with transportation and paying him to attend the decertification hearing. The provision of these benefits removes Respondent from a situation free of coercive conduct. Moreover, Sprague did not have a fixed intent to file a de-authorization petition until it was suggested to him by Wheeler, who was on Respondent's payroll at the time of the suggestion.[27]

Respondent, in its defense, also cites *General Electric Co.,* 230 NLRB 683 (1977), along with a series of cases, for the proposition that the Board has found it not unlawful to pay an employee for lost wages when the party summons the employee as a witness to a Board proceeding. Respondent argues in its brief that notwithstanding the fact that Sprague went to the August 10 hearing in his capacity as decertification petitioner and did not testify on behalf of Respondent, "he was still a possible witness to be called by the Company in the event any testimony presented by the union needed to be rebutted." I find this argument to be clearly specious. Both Sprague and J.R. Guagenti, who authorized Sprague's compensation for attending the decertification hearing, testified at the unfair labor practice trial. Neither testified it was in the contemplation of either party that Sprague may appear at the August 10 hearing as a witness for Respondent. Moreover, the subject matter of the August 10 hearing was whether an existing collective bargaining agreement served as a contract bar to Sprague's petition. There

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[27] For the reasons set forth above I find cases such as *Bridgestone/Firestone, Inc.,* 335 NLRB 941 (2001), cited by the Intervener to be distinguishable from the events here. There in response to an employee's question about how to get rid of the union the respondent informed him of the right to file a decertification petition and provided him decertification language. The Board found this conduct standing alone did not constitute more than a ministerial Act. Here, J.R. Guagenti introduced Respondent's consultant Wheeler to Sprague and Wheeler thereafter acted as Sprague's personal labor relations consultant throughout the decertification process. Respondent then financed Sprague's attendance at the decertification hearing on August 10, and shortly thereafter Wheeler suggested the filing of the de-authorization petition to Sprague. I do not find Respondent's actions here to be protected by Section 8(c) of the Act, or to be a mere ministerial Act.

was no representation at the unfair labor practice trial that Sprague had anything to do with the negotiation of that collective-bargaining agreement, or as a bargaining unit member what he could have said to add to the decertification hearing. Moreover, I have concluded based on Sprague's testimony that he informed Respondent he wanted to attend the decertification hearing in his status as petitioner, Respondent never informed him he might be a witness, and he could have only reasonably concluded he was being paid to attend the hearing because of his status as the decertification petitioner, and for the reasons stated his payment of wages was unlawful.

The Board stated in *SFO Good-Nite Inn, LLC*, 357 NLRB No. 16, slip op. at 1-3 (2011), enfd. 700 F.3d 1 (D.C. Cir. 2012) that:

> We agree. As we explain below, the disposition of this case is properly controlled by *Hearst Corp.*,[FN4] holding that an employer may not withdraw recognition based on a petition that it unlawfully assisted, supported, or otherwise unlawfully encouraged, even absent specific proof of the misconduct's effect on employee choice.
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> …*Hearst* applies when an employer has engaged in unfair labor practices directly related to an employee decertification effort, such as "actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative."[FN11] In those situations, the employer's unfair labor practices are not merely coincident with the decertification effort; rather, they directly instigate or propel it.[FN12] The Board therefore presumes that the employer's unlawful meddling tainted any resulting expression of employee disaffection, without specific proof of causation, and precludes the employer from relying on that expressed disaffection to overcome the union's continuing presumption of majority support.[FN13]
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> The Respondent's unfair labor practices were obviously directly related to furthering the employees' decertification campaign. Consequently, we agree with the General Counsel that the judge should have applied *Hearst*, rather than a *Master Slack* analysis. Doing so, we find that the Respondent's violations tainted the resulting employee petitions and rendered them an unreliable indicator of employee choice. The Respondent's withdrawal of recognition based on those petitions therefore violated Section 8(a)(5) and (1) of the Act.

In *SFO,* the Board rejected the respondent's argument that there was no evidence that any of the 14 employees who added their names to the decertification petitions knew about the Respondent's coercive acts. In *SFO* the Board stated the Board's decision in *Hearst* forecloses that argument. The Board in *SFO* stated that in *Hearst* the Board made clear that where an employer engages in unlawful activity aimed specifically at causing employee disaffection its misconduct will bar any reliance on an expression of disaffection by its employees, notwithstanding that some employees may profess ignorance of their employer's misconduct. The Board explained in *SFO* citing *Hearst* that the rule is justified because "when an employer unlawfully foists itself into an employee decertification campaign, it 'cannot expect to take advantage of the chance occurrence that some of its employees may be unaware of its actions,' but rather 'must be held responsible for the foreseeable consequence of its conduct.'" id. at 3.

The Board stated in *SFO,* slip op. at 3-4, that:

> *Hearst* thus creates a conclusive presumption that an employer's commission of unfair labor practices assisting, supporting, encouraging, or otherwise directly advancing

an employee decertification effort taints a resulting petition. As described, this presumption is based on the predictable result of an employer's unlawful, direct participation in an employee decertification effort—a petition plagued with uncertainty because of the very nature of the employer's unfair labor practices, which is *per se* insufficient to rebut the presumption of continuing majority status.[FN19] We reaffirm the *Hearst* presumption today for the reasons given in *Hearst* itself, described above, and for those that follow.

* * *

Nevertheless, the *Hearst* presumption is not the product of mere suspicion. Rather, it is grounded in the Board's approach, in all cases, of objectively assessing whether an employer's unlawful interference with employee rights likely undermined the reliability of an expression of employee choice.[FN26] Unlike a *Master Slack* situation, however, when an employer unlawfully thrusts itself into its employees' decertification debate there is little need for extended analysis of the likely impact of the employer's misconduct. As recognized in *Hearst* and in other cases, the objective "foreseeable consequence"[FN27] of such misconduct—and frequently its purpose—is "an inherent tendency to contribute to the union's loss of majority status."[FN28] Thus, no direct proof of the unfair labor practices' effect on petition signers is necessary to conclude that the violations likely interfered with their choice.[FN29]

* * *

Further, as a matter of policy, to the extent *Hearst* broadly prohibits employers from withdrawing recognition based on decertification petitions that they themselves unlawfully assisted, it provides a strong incentive to employers to steer clear of potentially unlawful conduct. Any other rule would condone the employer's unlawful acts, allowing it to take advantage of its coercion so long as its victims remained silent. As the Board stated in *Hearst*, "we are unwilling to allow [the employer] to enjoy the fruits of its violations by asserting that certain of its employees did not know of its unlawful behavior."[FN30]

In *SFO Good-Nite Inn, LLC v. NLRB,* 700 F.3d 1, 3 (D.C. Cir. 2012), the court stated;

…the Board has now articulated a clear line for applying the *Hearst* presumption of taint in "the narrow circumstance where an employer unlawfully instigates or propels a decertification campaign, and then invokes the results of that campaign to justify its unilateral withdrawal of recognition from its employees' representative." *SFO Good–Nite Inn, LLC,* 357 N.L.R.B. No. 16, at 4 (July 19, 2011). The Board explained that the *Hearst* presumption applies where the employer is directly involved in advancing a decertification petition, whereas the *Master Slack* test applies where the employer committed unfair labor practices unrelated to the petition that may have contributed to the erosion of support for the union. Upon finding that Good–Nite directly assisted and advanced the decertification effort by coercively asking employees to sign the petitions and unlawfully threatening to fire an employee for opposing it, the Board applied the *Hearst* presumption as there was no need to make a specific causation finding under *Master Slack.*

We hold that the Board's *Hearst* presumption is reasonable and consistent with the Act, and that the Board's factual findings are supported by substantial evidence in the record. Accordingly, we deny the petition for review and grant the Board's cross application for enforcement.

The court stated, "Agreeing with the General Counsel that Good–Nite's conduct *per se* precluded its reliance on the petitions as a valid basis for withdrawing recognition of the Union, the Board ruled that 'the disposition of this case is properly controlled by *Hearst Corp.,* holding that an employer may not withdraw recognition based on a petition that it unlawfully assisted,

supported, or otherwise unlawfully encouraged, even absent specific proof of the misconduct's effect on employee choice."' id. at 5. The court stated:

> Good–Nite's remaining arguments are unpersuasive. First, its description of *Hearst* as "little cited" is not well taken. Petr's Br. at 18. The Board and Good–Nite itself cite Board decisions enforced by the courts that applied the *Hearst* presumption where an employer solicited signatures or otherwise unlawfully encouraged a union decertification process. *See, e.g., Wire Prods. Mfg.,* 326 N.L.R.B. 625 (1998), *enforced mem. sub. nom. NLRB v. R.T. Blankenship & Assocs., Inc.,* 210 F.3d 375 (7th Cir.2000); *V & S ProGalv, Inc.,* 323 N.L.R.B. 801 (1997), *enforced,* 168 F.3d 270 (6th Cir.1999); *Am. Linen Supply Co.,* 297 N.L.R.B. 137 (1989), *enforced,* 945 F.2d 1428 (8th Cir.1991). id. at 9-10.[28]

While the above cases centered on a discussion of a respondent employer's withdrawal of recognition based on a tainted decertification petition, the Board will also dismiss a decertification petition where the petition is tainted by an employer's unfair labor practices. See, *Overnight Transportation Co.*, 333 NLRB 1392 (2001); and *Mercy, Inc.,* 346 NLRB 1004, 1006 (2006). Here, Respondent directly insinuated itself into the decertification process by introducing Sprague, on its own initiative, to Respondent's Labor Consultant Wheeler. Thereafter, Wheeler advised Sprague at every step of the way during the decertification process, as Sprague's testimony reveals that he spoke to Wheeler around the time he withdrew his initial decertification petition, and shortly before Sprague filed the current petition on April 3. On August 9 and 10, Respondent paid Sprague's wages and provided him transportation on August 10 so that he could drive over 300 miles to attend the decertification hearing. Following the hearing, Sprague again contacted Wheeler who informed Sprague of the idea of filing a de-authorization petition. Under the Board's pronouncements in *SFO Good-Nite Inn, LLC*, 357 NLRB No. 16 (2011), enfd. 700 F.3d 1 (D.C. Cir. 2012), I find Respondent has committed unfair labor practices directly tied to the decertification process and has provided more than ministerial aid in to advance Sprague's petition efforts. I therefore find Respondent, by its conduct, has tainted the currently pending decertification and de-authorization petitions filed by Sprague. Accordingly, I recommend to the Board that those petitions be dismissed.[29]

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[28] In *Wire Prods. Mfg.,* supra, the employer was found to have violated the Act in several respects including sending out a letter to unit employees encouraging them to decertify the Union. The Board found the respondent's unfair labor practices tainted the decertification petition on which the Respondent relied in withdrawing recognition. There on June 20, 1994, an employee began circulating a decertification petition. On July 18 the respondent employer sent employees a letter informing them of the decertification petition, and that employees could sign the petition in nonproduction areas and during breaks and before and after work. The letter also, among other things, described the disadvantages of union representation. The Board concluded that the letter in the context of the respondent's other unfair labor practices unlawfully undermined the union and influenced employees to reject it. The Board found the petition the employer relied upon to withdraw recognition was tainted. There was no finding there that the employer instigated or otherwise caused the initial circulation of the decertification petition.

[29] Counsel for the Acting General Counsel did not specifically address whether the petitions were tainted in his post-hearing brief. However, the issue of taint was addressed by Respondent and the Intervener in their briefs. Moreover, the matter was fully litigated as the nature of the remedy here is a direct result of the violations found.

CONCLUSIONS OF LAW

1. Respondent C & G Distributing Co. Inc., is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Truck Drivers, Warehousemen and Helpers, Local No. 908 affiliated with the International Brotherhood of Teamsters (the Union) is labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by:

(a) On August 9 and 10, 2012, paying the wages and providing transportation on August 10, 2012, to decertification petitioner employee Jerry Sprague to attend the decertification hearing in Cleveland, Ohio, on August 10, 2012, in Case 8-RD-77965.

(b) In August and September, 2012, through its agent William P. Wheeler, suggesting the idea to employee Jerry Sprague of pursuing the rescission of the contractual union security clause by the filing of a de-authorization petition, which was subsequently filed by Sprague in Case 8-UD-90639.

4. The unfair labor practices described above affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

ORDER

The Respondent C & G Distributing Co., Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Paying employees' wages and providing them transportation to attend decertification hearings, or otherwise providing them support beyond ministerial assistance in the decertification process.

(b) Suggesting to employees to a file a de-authorization petition to seek rescission of the contractual union security clause, or otherwise providing them support beyond ministerial assistance in matters relating the decertification and/or de-authorization of the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Lima, Ohio location copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its operations at Lima, Ohio, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current

[30] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

employees and former employees employed by the Respondent at any time since August 9, 2012.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. April 24, 2013.

_____
Eric M. Fine
Administrative Law Judge

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT actively assist any employee's effort to file and/or process a petition to decertify Truck Drivers, Warehousemen and Helpers, Local No. 908 a/w International Brotherhood of Teamsters, or de-authorize the collection of dues by that Union or any other labor organization.

WE WILL NOT pay employees for time spent traveling to and attending a decertification hearing, nor provide them the use of a company vehicle to attend such a hearing.

WE WILL NOT advise or solicit employees to file a petition seeking the rescission of the contractual union security clause.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

C & G DISTRIBUTING CO., INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1240 East 9th Street, Room 1695, Cleveland, OH 44199-2086
(216) 522-3715, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (216) 522-3740.